

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 158/2002

In the matter between:

ROBERT MFANUFIKILE DLAMINI

Applicant

and

HUB SPAR

Respondent

CORAM:

P. R. DUNSEITH : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA : MEMBER

FOR APPLICANT : R. NDLANGAMANDLA

FOR RESPONDENT : J. HENWOOD

J U D G E M E N T – 8/12/2006

1. This matter was allocated dates for trial on the 30th and 31st October 2006. According to the Applicant's representative, when he contacted the Respondent's representative Sifiso Dlamini, the latter directed the Applicant to serve notice of set down on the Federation of Swaziland Employers. The Federation however refused to accept service, stating that the Respondent is no longer their member. The Applicant's representative eventually served the notice of set down on the Respondent's manager on 27th October

2006.

2. When the matter came before court on 30th October 2006, the Respondent was represented by Mr. C. Motsa, who applied for a postponement. He told the court that his firm had only received instructions to represent the Respondent on 27 October 2006 by fax, and they were not in a position to proceed.
3. Mr. Ndlangamandla for the Applicant proposed that the matter be postponed to the 31 October 2006 for evidence to be led on the Applicant's case only. The matter could thereafter be postponed for leading evidence on the Respondent's case.
4. Mr. Motsa said that one more day was insufficient time for proper preparation, but he agreed to the trial proceeding on 18th to 19th December 2006 during court vacation. The matter was then postponed to 18th and 19th December 2006 for trial by consent.
5. The Respondent now applies for a further postponement, describing the days allocated as being the Respondent's busiest period of the year during which none of its witnesses will be available as they are all required to be at the Respondent's stores.
6. In his supporting affidavit, the Respondent's manager states that he is advised that the postponement to 18th and 19th December 2006 was "at the insistence of this Honourable Court". Whilst it is correct that the court agreed to make itself available during its vacation for the trial of the matter, the postponement and the dates fixed were agreed by the parties.

7. The court notes that a pre-trial conference was held on 16th July 2002, and this matter has been awaiting trial for more than four (4) years.
8. Sifiso Dlamini was on record as the Respondent's legal representative and appointed address for service of process in this matter on 30th October 2006. It was only due to the courtesy and/or inexperience of Applicant's representative that attempts were made to serve on the Federation and the Respondent instead of forcing service upon Sifiso Dlamini. If the Respondent's legal representative had not declined service of the notice of set down, the trial would have proceeded on 30th October 2006.
9. It is further noted that Sifiso Dlamini remains on record as the Respondent's representative and no notice of withdrawal or substitution has been filed, notwithstanding that the firm of Cloete/Henwood/Dlamini Associated purports to now act in the matter.
10. Technicalities aside, the court's view of the matter is that this trial has been delayed due to the confused state of Respondent's representation. It is not fair to the Applicant that the matter should be delayed further, particularly in circumstances where the postponed dates were fixed by agreement between the parties. The Applicant will be substantially prejudiced if the trial is postponed to next year, particularly as the roll for the first session of 2007 has already been compiled and new trial dates may not be possible until April/May 2007.

11. Mr. Ndlangamandla for the Applicant indicated that he would consent to a postponement at the close of the Applicant's case. In that event, the Respondent would not have to call its witnesses to court during their busy period. Mr. Henwood rejected this compromise, stating that he cannot conduct his client's defence in the absence of witnesses.

12. After careful deliberation, the court does not consider that the Respondent will be materially prejudiced if the trial proceeds on the 18th and 19th December 2006. Its witnesses may be busy over this period, but they are available. The demands of justice must take precedence over the exigencies of commerce. The Respondent's attorney can adequately prepare for the trial by the 18th December 2006, and if he requires consultations for purposes of cross examinations, the advent of mobile telephones allows for instant long-distance consultation. At the close of the Applicant's case, the application for a postponement may be renewed.

13. The present application is dismissed. There is no order as to costs.

The members agree

PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT